United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-5006

United States Court of Appeals
FOR THE SECOND CIRCUIT

B

In the Matter

of

AMERICAN EXPRESS WAREHOUSING, LTD.,

Debtor.

P/S

BRIEF OF APPELLEES DUNNINGTON, BARTHOLOW & MILLER AND SCARBURGH COMPANY, INC.

Dunnington, Bartholow & Miller
Attorneys for Appellees
Dunnington, Bartholow &
Miller and Scarburgh Company, Inc.
161 East 42nd Street
New York, New York 10017

Of Counsel,

Charles L. Stewart
Richard E. Rieder
Rigdon H. Boykin

3

TABLE OF CONTENTS

AUTHORITIES CITED

Cases:

United States Court of Appeals
FOR THE SECOND CIRCUIT

IN THE MATTER

of

AMERICAN EXPRESS WAREHOUSING, LTD.,

Debtor.

BRIEF OF APPELLEES DUNNINGTON, BARTHOLOW & MILLER AND SCARBURGH COMPANY, INC.

Issue

1. Was it error for Judge Ryan to grant the application of Dunnington, Bartholow & Miller, attorneys for claimant Scarburgh Company, Inc., for their fees in opposing the application of the Official Creditors Committee of the Debtor for their fees and expenses in this proceeding?

Statement of the Case

This is an appeal from an order of the United States District Court for the Southern District of New York issued by Judge Sylvester J. Ryan and entered March 26, 1975, granting the application of Dunnington, Bartholow & Miller ("Dunnington") attorneys for Scarburgh Company, Inc. ("Scarburgh"), for their fees in opposing the application of Debtor's Official Creditors Committee ("OCC") for the payment of their fees and expenses in this proceeding.

Statement of Facts

The debtor herein, American Express Warehousing Company, Ltd. ("Limited"), a wholly owned subsidiary of American Express Company ("Amexco"), was engaged in warehousing oils and animals fats. In 1963, Limited operated a tank farm comprised of 139 tanks leased from Allied Crude Vegetable Oil Refining Corporation ("Allied") in Bayonne, New Jersey (J.65a).*

Limited stored oils owned by Allied in its tanks and issued warehouse receipts to dealers, brokers and financial institutions as security for loans made to Allied or for its account. Scarburgh, as a broker, made loans to Allied, many of which were secured by receipts issued by Limited (J.66a).

On November 19, 1963, Allied filed a petition in bankruptcy in the United States District Court for the District of New Jersey and was shortly thereafter adjudicated a bankrupt (J.66a). The discovery of the fraudulent activities of Anthony De Angelis, Allied's president, led to investigations which disclosed that the warehouse receipts issued by Limited vastly overstated the amount of oil stored in its tanks (J.65a-66a). It soon became apparent that Limited was faced with over $100 million of claims for missing or non-existent oil and fats (J.39a).

On December 30, 1963, Limited filed for reorganization under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of New York (J.66a).

On January 28, 1964, the first meeting of Limited's creditors was held. At that meeting, the attorneys representing most of the large creditors were elected to the Official

---

* The Joint Appendix is referred to as J. followed by the page number in the Joint Appendix.

Creditors Committee ("OCC") (J.66a). The members of the OCC decided to retain their own firms as counsel and divide the work among themselves. They also decided to retain the services of Dewey, Ballantine, Bushby, Palmer & Wood whose client Bunge Corporation was the only major creditor of Limited not represented by an OCC member (J.68a).*

Prior to their appointment on the OCC, these attorneys had reached an agreement with their clients that they would be compensated for their services as members of the OCC (J.67a). Their clients and Bunge Corporation, constituting all of the largest creditors, agreed among themselves to pay the OCC fees on a prorata basis, the individual ratios being the size of their claims over the total claims (J.68a).

Despite the erroneous assertion of the debtor on page 2 of its brief, Scarburgh was one of the major creditors who paid its proportionate share of OCC fees.**

On March 8, 1974, David Hartfield, Jr., as Chairman of the OCC (at the direction of only a majority of the OCC), submitted a petition to the United States District Court, Southern District of New York seeking an order granting an allowance for the services rendered by the members of the OCC. The allowance, if granted, would be used to reimburse the particular creditors of Limited who paid the fees of members of the OCC (J.12a-14a).

---

* The Acting Secretary of the OCC is Murray H. Warschauer, secretary and general counsel for Bunge (J.67a).

** Due to an agreement between Scarburgh and its creditors, Scarburgh's creditors shared in both Scarburgh's recovery from the debtor's estate and the expenses of the OCC. Thus, the Scarburgh group, composed of The Bank of America, Marine Midland Trust Company of New York, Morgan Guaranty Trust Company of New York, J. Henry Schroeder Banking Corp., and Scarburgh Company, had claims in excess of $25,000,000 against Limited and has paid the OCC, as of the date of the OCC petition, $183,390.09 or 22.7% of the total compensation paid the OCC (J.59a-60a).

Prior to submission of the petition, Dunnington informed the members of the OCC that there was no basis in law for such an application and urged that it not be made. After the petition was filed, Dunnington informed counsel for the debtor of Dunnington's position with regard to the application and asked if they were going to oppose it (J.173a-176a). Upon being unable to persuade the OCC not to submit the petition and upon learning that the Debtor would not oppose it, Dunnington on behalf of its client, Scarburgh, submitted an affidavit and memorandum of law in opposition (J.175a).

Dunnington also appeared at the hearing on March 28, 1974 and argued against the OCC request. At that time, Judge Ryan ruled from the bench that he would grant the application of the OCC (J.176a).

On April 26, 1974, the OCC submitted an order granting their application for settlement and signature (J.114a, J.176a). Judge Ryan, however, declined to sign the order. Subsequently, on June 6, 1974, he handed down an opinion stating that he had further studied the matter and denying the application of the OCC. (Opinion No. 40787 of Judge Sylvester J. Ryan, (J.152a)).

On January 24, 1975 Dunnington submitted an application to the United States District Court, Southern District of New York for attorneys' fees and costs in the amount of $39,544.00 incurred in Scarburgh's successful opposition to the OCC petition (J.171a).

In an opinion and order entered March 26, 1975, Judge Sylvester J. Ryan granted fees to Dunnington in the amount of $26,000 (J.220a), which were all the funds the debtor had remaining. In so doing, Judge Ryan, the judge who has directly supervised all of the proceedings in this Chapter XI proceeding for the past ten years indicated his belief that the facts giving rise to the Dunnington application satisfied the three criteria for the award of such fees laid down by this court in *In Re New York Investors,* 130 F.2d 90, 92 (2nd Cir. 1942) and *In re Sapphire Steamship Lines, Inc.,* 509 F.2d 1242 (2nd Cir. 1975).

POINT I

Judge Ryan correctly held that Dunnington's application falls within the criteria laid down by the Second Circuit for the award of counsel fees.

The general rule, laid down by this Court in *In re Progress Lektro Shave Corporation,* 117 F.2d 602 (2nd Cir. 1941); *In re Porto Rican American Tobacco Co.,* 117 F.2d 599 (2nd Cir. 1941); *In re Realty Associates Securities Corporation,* 69 F.2d 41 (2nd Cir.), *cert. denied,* 292 U.S. 628 (1934); *In re Sapphire Steamship Lines, Inc.,* 509 F.2d 1242 (2nd Cir. 1975), is that it is the duty of the trustee to perform all services necessary for the administration and conservation of the estate of a debtor. For its services the trustee is to be compensated from the estate. However, that rule also provides that compensation can be paid from the estate to others if (1) the trustee refuses or fails to act, (2) the applicant confers a tangible benefit upon the estate and (3) the court authorizes the applicant to act instead of the trustee.*

However, as this court has recently recognized in *Sapphire, supra,* there is a narrow exception to the rule. Formal court appointment is not required when the trustee fails to act, the action of others results in substantial savings to the estate and "special circumstances" exist, 508 F.2d at 1246.

The facts in this matter demonstrate that Dunnington's efforts fall within this exception to the general rule.

1. The Debtor Refused Or Failed To Act.

The debtor has stated that it did not refuse or neglect to act with respect to the OCC application. Instead, it asserts that it considered the application to be a dispute

---

* The debtor in possession is a Court Officer and has the powers and duties of a Trustee. *In re Will-Low Cafeterias,* 111 F.2d 83 (2nd Cir. 1940); 8 *Collier on Bankruptcy,* ¶ 6.32 (14th Ed. 1975).

between two groups of creditors and therefore it was under no duty to take a position. This same argument was advanced before Judge Ryan and he rejected it as not being warranted under the actual facts which existed and the fiduciary responsibilities imposed by law upon the debtor.

The debtor also seeks to rationalize its non-action by claiming that the law with respect to fees for members of creditors committees was unclear. Such was not the case.

The OCC petition represented an attempt by some of the large creditors in this proceeding to obtain a clearly prohibited preference. The debtor in possession is an officer of the court and has a clearly recognized duty to oppose unlawful claims upon its estate. 8 *Collier on Bankruptcy*, 14th Edition ¶ 6.32 (1975).

The reason that compensation to members of creditors committees is disallowed is to prevent large creditors from obtaining preferences by appointing themselves or their counsel to the OCC. *Lane* v. *Haytian Corporation of America*, 117 F.2d 216 (2nd Cir.), *cert. denied*, 313 U.S. 580 (1941); *In re Realty Associates Securities Corp.*, 69 F.2d 41, 44 (2nd Cir.), *cert. denied*, 292 U.S. 628 (1934); *In re Siegel*, 252 F. 197 (S.D.N.Y. 1918) reversed on other grounds, 256 F. 226 (2nd Cir. 1919); *Nassberg* v. *Rockwell Baking Corporation*, 172 F.2d 554 (2nd Cir. 1949); *In re National Plastikwear Fashions, Inc.*, Bkcy No. 89251, Op. No. 20990 (Summary reported in CCH Bankruptcy Reporter Transfer Binder ¶ 58,064 (D.C.N.Y. 1954).

Lane, Realty Associates, Siegel, Nassberg and *Plastikwear, supra,* clearly indicated that such an allowance was prohibited. In fact, the recent bankruptcy rules, promulgated by the United States Supreme Court have codified this prohibition. Rule 11-29 in pertinent part states:

> "No member of the [creditors] committee may be compensated for services rendered by him in the case."

The Advisory Committee's Note makes clear that this prohibition includes compensation for acting as the attorney for the committee while remaining as a member of the committee, U.S.C.A. "Bankruptcy Rules and Official Bankruptcy Forms" at 239 (West Publishing Co. 1974).

In summary, the Debtor unjustifiably failed to oppose the application of the OCC, an application which Judge Ryan recognized clearly had no legal support:

> "While it seems clear in this Circuit that creditors may elect their respective attorneys to serve on the Creditors' Committee (*Arrow Dairy* v. *Chase Superior,* C.A.N.Y. 1941, 116 F.2d 573), there is no statutory authority to pay them fees as such members . . . Nowhere is there authorization for payment of fees as administrative expenses to the members of the Committee qua members, and no case has held that they may be paid, even as attorneys. *Lane* v. *Haytian Corporation of America,* 117 F.2d 216 (2nd Cir. 1941), cert. denied, 212 U.S. 508 . . .
>
> The holding in *Lane, supra,* could not be clearer." (J.156a)

To now assert that taking no position on such application was an action is tantamount to claiming that the debtor had no duty whatsoever to conserve its estate or to act as an officer of the court.

2. Dunnington's Services Benefited The Estate Of The Debtor By Over $700,000.00.

The debtor appeals Dunnington's fee award in part on the ground that some creditors were injured by the denial of the OCC petition. That is not the issue. The relevant question is whether a significant benefit has been conferred upon the estate of the debtor in which all creditors will share as provided by bankruptcy law and the plan of arrangement. Dunnington's opposition to the OCC petition had such a result. It prevented an illegal preference and conserved the estate of the debtor in an amount in excess of $700,000.

Furthermore, the debtor's assertion that some of the creditors may have been injured and others benefited thereby is only speculation. The large creditors which were represented on the OCC certainly have benefited by such representation. Their interests in this proceeding were undoubtedly protected.* Accordingly, speculation that they may have been injured does not alter the fact that the estate of the debtor was benefited—and has been distributed in accordance with the law.

3. Special Circumstances Justifying The Payment Of Legal Fees To Dunnington, Bartholow & Miller.

While this court recognized the "special circumstances exception" in *Sapphire,* 509 F.2d at 1246, it did not specifically enumerate what constituted special circumstances. This Court did, however, refer to an earlier decision *In re New York Investors, supra,* 130 F.2d at 92, where payment of fees was allowed to objecting counsel who had successfully opposed exorbitant fee applications of the trustee and his counsel, which the trustee obviously would not oppose.

In the case at hand special circumstances did exist; the OCC, attorneys representing the largest creditors, attempted to obtain a clearly illegal preference for their clients; the Debtor failed to perform its duty as a debtor in possession to conserve its estate; the District Court was misled as to the law with respect to compensation for OCC members by attorneys with whom it had dealt for over ten years in this proceeding; and counsel for the debtor, an officer of the court, failed to inform the Court of the true state of the law. Other creditors either would not or could not individually financially afford to brief the questions presented in the detail necessary to illustrate

---

* As Dr. Abraham Feinstein has testified, the OCC did a tremendous job—for *their* clients—at the expense of the smaller creditors (J.132a-139a).

to the District Court the lack of basis either in equity or in law for the OCC application.*

It was only after reading the papers submitted by Dunnington that Judge Ryan, who orally granted the petition, decided not to sign the OCC order and wrote an opinion denying their application. As we have stated, he has personally supervised this proceeding for over ten years and presided over the hearings in both the OCC application and Dunnington's application. With this intimate first hand knowledge of all the facts and circumstances surrounding the Dunnington application, Judge Ryan held that special circumstances existed fitting Dunnington's application within the exception to the prior approval rule laid down by this Court in *New York Investors* and commented upon in *Sapphire*.

Conclusion

For the reasons set forth above, the Order of the United States District Court for the Southern District of New York by the Honorable Sylvester J. Ryan entered March 26, 1975, granting the application of Dunnington, Bartholow & Miller for counsel fees in opposing the application of the Official Creditors' Committee for counsel fees and expenses, should be affirmed.

Respectfully submitted,

DUNNINGTON, BARTHOLOW & MILLER
Attorneys for Appellees
Dunnington, Bartholow &
Miller and Scarburgh Company, Inc.

CHARLES L. STEWART
RICHARD E. RIEDER
RIGDON H. BOYKIN
Of Counsel

---

* See testimony of Dr. Abraham Feinstein (J.132a-140a) and letter of A.E. Staley Manufacturing Company (J.123a).